STATE OF MICHIGAN

COURT OF APPEALS

CARL STAWARZ,

Plaintiff-Appellant,

v

FRESARD & WHIPPLE, PC,

and

DONN M. FRESARD,

Defendants-Appellees.

UNPUBLISHED
February 14, 2003

No. 234542
Macomb Circuit Court
LC No. 00-004002-NM

CARL STAWARZ,

Plaintiff-Appellee,

v

FRESARD & WHIPPLE, PC,

and

DONN M. FRESARD,

Defendants-Appellants.

No. 236991
Macomb Circuit Court
LC No. 00-004002-NM

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the court's order granting summary disposition in favor of defendants (docket no. 234542). Defendants appeal as of right the court's award of attorney fees and costs (docket no. 236991). We affirm docket no. 234542, and reverse docket no. 236991.

Because the court determined that plaintiff's claims were barred by the applicable statute of limitations, summary disposition was granted pursuant to MCR 2.116(C)(7), a decision which we review de novo. *Terrace Land Development Corp v Seeligson & Jordan*, 250 Mich App 452,

454-455; 647 NW2d 524 (2002). In determining whether a party is entitled to summary disposition under MCR 2.116(C)(7), the court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor, *Id*. at 455, unless specifically contradicted by the documentation submitted, *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994). If there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision as to whether a plaintiff's claim is barred is a question of law. *Terrace Land Development, supra* at 455.

MCL 600.5838 provides that a plaintiff in a legal malpractice action must file suit within two years of the attorney's last day of service, or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later. The burden of establishing that a claim is barred by the expiration of a limitations period rests on the party asserting the defense; in this case, defendants. *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 5; 555 NW2d 496 (1996).

Plaintiff argues that defendants' last day of service was in September 1999 when he terminated the relationship, and, therefore, his complaint was timely because it was filed within two years of that date. Plaintiff asserts that the relationship cannot be considered to have ended earlier because plaintiff never received notice that the firm had been dissolved. Plaintiff argues that, in any event, summary disposition was improper because when an attorney-client relationship ends is a question of fact.

In regards to defendant Fresard, there is no factual issue regarding when the attorney-client relationship ended because Fresard was never plaintiff's attorney. Plaintiff's only contacts with Fresard were in September 1994 when Whipple introduced him, and at a wedding five years later. Plaintiff admitted that Whipple was the attorney assigned to plaintiff's case and Fresard had no part in his litigation. It was Whipple who entered into and signed the contingent fee agreement with plaintiff on behalf of the firm and continued to represent plaintiff after the firm dissolved.

Contrary to plaintiff's contention that he looked to Fresard for continuing representation, plaintiff testified at his deposition that he never sought legal advice from Fresard because Whipple was handling his case. We do not believe that plaintiff's conversation with Fresard at the wedding can be construed as evidence of a continuing relationship. If anything, plaintiff was seeking to establish a relationship. Plaintiff presents no evidence that he ever relied on Fresard for services.

In regards to maintaining a malpractice action against Fresard, generally, only the client of an attorney can sue for malpractice. *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 518; 475 NW2d 294 (1991). However, negligence, on which the instant claims are based, is one theory under which a malpractice action can be maintained against an attorney by a non-client who was harmed by the attorney's action. *Mieras v DeBona*, 452 Mich 278, 296; 550 NW2d 202 (1996).

The only perceived duty Fresard owed plaintiff was to notify him of the firm's dissolution. Fresard's obligation to plaintiff ended in March 1995, at the time of the firm's dissolution. Thus, the two-year statute of limitation would have expired in 1997. Further, even under the statute's discovery rule, plaintiff's claims against Fresard are still time-barred. Plaintiff stated that he discovered the firm dissolved when he spoke with Fresard at the

September 1999 wedding, but did not file this action until September 2000, more than one year later.

We next address plaintiff's claims against defendant Fresard & Whipple, PC. A client's employment of one member of a law firm is deemed employment of the firm itself. *Estate of Mitchell v Dougherty*, 249 Mich App 668, 681; 644 NW2d 391 (2002). Plaintiff is correct that an attorney does not discontinue servicing his client until the court or the client relieves him of the obligation. *Id.* at 683. However, an attorney-client relationship can be terminated by implication, through the actions or inactions of the client. *Id.* at 684-685.

In *Mitchell*, the plaintiffs entered into a contingent fee agreement with two attorneys at a particular law firm, who filed a case on their behalf. *Id*. at 671. The attorneys subsequently left the firm, but continued to represent the plaintiffs, and the law firm changed its name. *Id*. at 671-672. The plaintiffs did not sign a new agreement with the attorneys after they left the law firm, and characterized the attorneys' separation as a "change of address." *Id*. at 681, 685 n 8. The Court noted that an attorney-client relationship ends when the client retains new counsel. *Id*. at 684. The Court reasoned that, although the plaintiffs did not retain "new" counsel, they continued their representation with the two attorneys, they had no further contact with the law firm, nor sought any services from the law firm, and this was the functional equivalent of retaining new counsel. *Id*. at 685. Thus, the law firm was relieved of any obligations regarding the plaintiffs when the attorneys left the firm. *Id*. at 685-686.

Similarly, in this case, we find that the firm's representation of plaintiff ended when Whipple left the firm, the firm was dissolved, and Whipple set up his own practice in March 1995. Whipple continued to represent plaintiff, and in fact, did not file the complaint on plaintiff's behalf regarding the auto negligence action, the mismanagement of which is the major basis of plaintiff's malpractice claims, until 1997. Plaintiff visited Whipple at his new office, phoned him there, and exchanged correspondence with him at this new address. Plaintiff also received correspondence from Whipple and the court identifying Whipple's firm as Whipple & Associates, PC. Plaintiff presents no evidence that he ever relied on the firm for services after Whipple's departure. Furthermore, plaintiff had no contact with the firm after Whipple left, because the firm itself was dissolved.

We conclude that any legal malpractice claim plaintiff had against the firm accrued when Whipple left the firm and it was dissolved in March 1995. Because plaintiff did not file this action until September 2000, plaintiff needed to prove that this case was filed within six months of when he discovered or should have discovered the existence of the claims. MCL 600.5358(2). However, plaintiff admits that he discovered the existence of his claims when he spoke with Fresard at the September 1999 wedding, one year before the instant action was filed. Therefore, plaintiff's claims are barred by the statute of limitations. Accordingly, we hold that the court properly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

Defendants argue that the amount of the award was insufficient because the trial court should have awarded them their actual attorney fees and awarded them against both plaintiff and his attorney. Plaintiff asserts that the trial court erred in awarding attorney fees because its determination that plaintiff's lawsuit was frivolous was incorrect.

We review the trial court's finding that the suit was frivolous for clear error. A decision is clearly erroneous when the appellate court is left with a definite and firm conviction that a mistake was made. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). In determining whether a claim was frivolous, the court must look at the circumstances as they existed when the claim was made. *Id*.

In this case, plaintiff asserted that he believed his attorney-client relationship had continued until September 1999, at which point the two-year statute of limitations began to run. After reviewing the facts as they existed at the time plaintiff filed his claim, while his argument may have been tenuous, we cannot say that it was frivolous. Therefore, we conclude that the trial court clearly erred in finding to the contrary. Accordingly, because there was no other basis on which to award costs and attorney fees, the award in favor of defendants was also in error.

Docket no. 234542 is affirmed. Docket no. 236991 is reversed and the order awarding attorney fees is vacated.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette